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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 298

HANS GEISLER,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Hans Geisler, presently out on bail from confinement on Ellis Island, New York Harbor, New York, awaiting deportation to Germany, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 9, 1949, and the "Petition for Rehearing" therein denied on July 8, 1949. The Seventh Circuit af-

firmed the judgment of the United States District Court for the Northern District of Illinois, entered on November 4, 1948 canceling and revoking this petitioner's certificate of citizenship. The opinion of the Seventh Circuit United States Court of Appeals was written by Judge Minton, Circuit Judge.

The instant case emanated from a judgment entered in the United States District Court for the Northern District of Illinois on November 24, 1942 canceling and revoking petitioner's certificate of citizenship while petitioner was a prisoner of war confined at Fort Sheridan, Illinois. The complaint filed by the Government was answered by the defendant after being advised by the army officers at Fort Sheridan, and by a representative of the United States District Attorney's office at Chicago, Illinois, that one in his predicament, that is, having been convicted by an army court-martial of an offense cognizable only by a court-martial, had no defense to these denaturalization proceedings and that he would automatically be denaturalized and that he might as well file the answer consenting to judgment, which he did and personally appeared in court with no attorney and no witnesses other than himself when a judgment was entered, and he was returned to prison. About four years thereafter, while still a prisoner of the United States Government at New York, he filed a "Petition for Rehearing", to which the government filed a motion to dismiss on the grounds that it was too late and insufficient. The government's petition was denied by a proper order entered (Abst. 23) and the District Court vacated the order of Nov. 24, 1942 which had cancelled his naturalization certificate and restored Geisler to citizenship (Abst. 23). Thereafter, without an answer by the government to the "Petition for Rehearing", the Dis-

trict Court heard testimony on the merits of the original cause, and thereafter, on that testimony, entered a third order vacating the second order which vacated the original denaturalization judgment restoring the naturalization certificate, and again for the second time denaturalized the defendant (Abst. 106). From that order the defendant appealed to the United States Circuit Court of Appeals for the Seventh Circuit, which court affirmed the United States District Court, and defendant brings this petition for certiorari to review the action of said Circuit Court of Appeals.

Opinions Below.

Two opinions of the District Court in the form of memoranda are set forth in R. 19 to 23, inclusive, and 94 to 107 inclusive, as is the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 124).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A. 347).

Questions Presented.

(1) Were petitioner's constitutional guaranties abridged when the United States District Attorney in Chicago, by his representative, and the army officers at Fort Sheridan having custody of the petitioner during his imprisonment, by false representations induced petitioner to file an answer to the complaint admitting all charges therein contained and consenting to the denaturalization judgment?

(2) Does a petition filed by defendant to vacate a prior judgment to which plaintiff files a motion to dismiss, which motion is denied, require an answer to present an issue for decision?

(3) Does excusable neglect permit entertaining a petition in the nature of a motion to vacate a judgment entered three and one-half years prior thereto where the District Court holds that deferring such action was excusable neglect?

(4) Is the decision of the Circuit Court of Appeals, Seventh Circuit, in conflict with the decisions of the United States Supreme Court when it holds that under Rule 60 (b) of the Federal Rules of Civil Practice a judgment entered three and a half years prior cannot be vacated for excusable neglect such as existed here?

(5) Was the Circuit Court of Appeals, Seventh Circuit, in error when it holds that testimony was presented to sustain the original decree herein besides the admissions of the defendant?

(6) Was the decision of the Circuit Court of Appeals, Seventh Circuit, holding that the order of the District Court vacating a prior denaturalization judgment and ordering the reinstatement of the naturalization certificate was not a final order from which an appeal could be taken correct?

(7) Was petitioner's constitutional guaranties abridged when he was brought into the United States District Court in the custody of the United States army officers who, together with a representative of the United States District Attorney's office at Chicago, by misrepresentations induced petitioner to file an answer and admit all charges of the complaint, without appointing an attorney to represent him at that occasion?

(8) Was the evidence of a clear and convincing character to warrant a cancellation of citizenship?

STATEMENT OF FACTS.

On September 4, 1942 the government filed a complaint (R. 2) in the District Court of the United States for the Northern District of Illinois, Eastern Division, to denaturalize and cancel the naturalization certificate of Hans Geisler for the reason that he, Geisler, while serving as a Private First-Class in Company "L" 2nd U. S. Infantry, at Fort Sheridan, Illinois, at the request of army officers, had made an affidavit in which he stated amongst other things that he felt and believed that Germany was justified in its present struggle and was fighting for its daily bread; that he hoped Germany would win over England; that he expressed an admiration for Hitler and his Nazi regime; that he believed the United States had no business in the war and that it was nothing but a capitalist war to make a few people rich; that he had attended bund meetings on an average of once a month for three years; that he refused to fight or bear arms for the United States against Germany; that he refused to bear arms against Japan; that he was ready to renounce his citizenship rather than to fight against Germany or Japan; that at that time he did not intend to fulfill his oath of allegiance to the United States against her enemies,—Germany, Italy or Japan; that he does not and did not belong to any club or association except the National German Alliance; that he had read said affidavit and that the same was free and voluntary; that he was warned of his rights; and that he had been tried by court-martial for executing said affidavit and statements, convicted and was serving a five year sentence therefor.

That thereafter, on November 24, 1942 (R. 5) Geisler, while confined in the Guard House at Fort Sheridan, filed

his answer admitting all the charges of the complaint, consented to an immediate hearing and to the entry of the order setting aside his naturalization. An order to that effect was entered by the court on the same day, November 24, 1942 (R. 6).

On March 27, 1946, while Geisler was still a prisoner, he filed his "Petition for Rehearing" in the same proceeding (R. 9).

Geisler's petition sets forth that the statements on which he was convicted by the court-martial and which formed the basis for cancelling his citizenship were involuntary and made without benefit of counsel; that the answer he filed was induced by circumstances of his confinement, and by statements made and advice given him by certain army officers and representatives of the United States Attorney's office in Chicago. He then alleged that the statements made in his petition for naturalization were not false or fraudulent nor was his oath of allegiance; that the petition was filed and presented and the oath taken in good faith; that the proceedings were a denial of due process of law to him; that he does not allege that the officers of the United States Army or the representatives of the office of the United States Attorney in Chicago intentionally or fraudulently misinformed him to his disadvantage, intending to deprive him of due process of law and of his citizenship in the United States, but that the entire circumstances of the trial and his court-martial so beclouded the defendant's rights that the result was a deprivation of due process of law; that he was advised by all with whom he spoke that he had no chance to retain his citizenship; that people in his situation would automatically be denaturalized; that Germans at that time had no chance to enforce their rights in court; and that,

relying upon these representations to his disadvantage, he filed the answer which he filed in the proceeding to cancel his citizenship. He then alleged that he had since been informed and now believed that he had a good defense and answer on the merits of the complaint and that he was desirous of having the cause tried on its merits and having his day in court, that he had a full, complete and true answer in defense to the complaint, and that he reaffirmed the allegations in his petition for naturalization and his oath of allegiance. He prayed that the order of November 24, 1942 be set aside and held for naught, that a new trial of the issues contained be granted, and that he have such other relief as might seem just and equitable.

To this petition the United States directed a motion to dismiss, for the reasons that the petition did not state grounds upon which relief could be granted; that the court lost jurisdiction of the cause by expiration of the term of rendition, and further by the expiration of the six-month period provided in Rule 60 (b) of the Federal Rules of Civil Procedure; that the petition is in effect a bill for review and the United States has not consented to become a party; that the errors alleged in the petition were within the knowledge of the defendant within six months after the entry of the judgment; that if the petition is construed as a motion for a new trial, it was too late because not filed within ten days of the rendition of judgment as required by Rule 59 (b) of the Federal Rules of Civil Procedure; that if the petition is construed as a motion for a new trial based on newly discovered evidence, it was not filed before the expiration of the time for appeal from the final judgment, as required by Rule 59 (b); and that if the petition is construed as a bill of review, it fails to state the usual grounds therefor, namely, (a) error of law apparent on the face of the record, and (b) newly discovered evidence.

The court overruled this motion to dismiss and without hearing any evidence vacated the decree of November 24, 1942, and reinstated the defendant's citizenship. This order was entered November 7, 1946.

The District Court having vacated the judgment of November 24, 1942, by its order of November 7, 1946, solely upon the petition of the defendant, proceeded on April 21, 1947, to hear again the issues tendered by the complaint filed by the United States September 4, 1942, for the cancellation of the defendant's citizenship, without requiring the Government to file an answer to Geisler's petition of March 27, 1946, and on November 4, 1948 (R. 105) entered an order vacating the order of November 7, 1946, and again reinstated the order of November 24, 1942, denaturalizing Geisler. This was appealed to the Circuit Court of Appeals, Seventh Circuit, and there affirmed.

Reasons Relied on For Allowance of the Writ.

(1) Petitioner's constitutional guaranties were abridged when the United States District Attorney's office in Chicago, by its representatives, and the army officers at Fort Sheridan having custody of the petitioner during his imprisonment, by false representations induced petitioner to file an answer to the original complaint herein admitting all charges and consenting to a decree of denaturalization on the ground, as they advised him, that he had no defense to the charges, that a German had no standing in our courts, and that he would be automatically denaturalized.

(2) The Circuit Court of Appeals, Seventh Circuit, has rendered a decision in conflict with applicable local decisions in that it holds that a motion in the nature of

a petition for a writ of error *coram nobis*, or a petition for review, to which a motion to dismiss is filed and overruled, requires no answer to present an issue.

(3) The Circuit Court of Appeals, Seventh Circuit, has rendered a decision in conflict with applicable decisions of the Supreme Court in that it fails to approve and follow the decisions of the Supreme Court giving leave to file a motion to vacate a judgment rendered three and one-half years prior thereto where the delay is caused by excusable neglect.

(4) The Circuit Court of Appeals, Seventh Circuit, has failed to follow the rule established by the United States Supreme Court by decisions that in cases of excusable neglect a motion is permitted under Rule 60 (b) of Federal Rules of Civil Practice, by which a prior judgment may be vacated at any time, and particularly within the time applicable to the situation in this case.

(5) The Circuit Court of Appeals, Seventh Circuit, erroneously holds in this cause that testimony besides the defendant's was taken at the time of the entry of the first denaturalization decree.

(6) The Circuit Court of Appeals, Seventh Circuit, erroneously holds that an order of the District Court of the Northern District of Illinois vacating a prior denaturalization order and reinstating the certificate of naturalization voided by the prior order is not a final order.

(7) Petitioner's constitutional guaranties were abridged when he was brought into the United States District Court by United States army officers who had him in custody in pursuance of a conviction by a court martial and which officers and a representative of the United States District Attorney's office at Chicago, Illinois, by false represen-

tations induced him to answer the original complaint herein by filing a written answer and verbally, in court, admitting the truth of the complaint, without the appointment by the Court of an attorney to represent him at that occasion.

(8) Misrepresentations to Geisler by Army officers and United States District Attorney's representative with reference to Geisler's rights should cancel and annul all proceedings herein.

Prayer for Writ.

Wherefore, your petitioner prays for a writ of certiorari to be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant case, so that this cause may be reviewed and determined by this Court, and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed and that the petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No.

HANS GEISLER,
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UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Summary of Argument.

1. Certiorari should issue to correct the judgment of the Seventh Circuit Court of Appeals in a case involving abridgment of petitioner's constitutional rights.

2. Geisler's petition for a rehearing was in the nature of a motion in the same cause to which a motion to dismiss was filed, denied and no answer being then filed to it, its facts thereof stand admitted.

3. A motion for a rehearing for excusable neglect may be filed at any time.

4. A motion to vacate under Rule 60 of Federal Rules of Civil Procedure may be made at anytime for excusable neglect.

5. At the time of the entry of the denaturalization judgment on November 24, 1942, no evidence was heard except the admissions of Geisler.

6. The order of November 7, 1946 is a final order.

7. Under the circumstances of this case the court should have appointed an attorney for Geisler on November 24, 1942 before entering a denaturalization judgment or decree and proceeding without an attorney was a denial of his constitutional guaranties.

8. Misrepresentations to Geisler by Army officers and United States District Attorney's representative with reference to Geisler's rights should cancel and annul all proceedings herein.

ARGUMENT.

I.

Hans Geisler, this petitioner, was tricked by United States officers twice, which accounts for his present predicament. First, while he was a private first-class of Co. L 2nd U. S. Infantry and drilling on the drill field at Fort Sheridan, Illinois, attending to the military duties assigned to him on January 24th or 25th, 1942 (R. 30) with no record of any misconduct, no prior arrests (R. 51) and no refusal to comply with any military order directed to him, and never having been heard to say anything disrespectful about the United States (R. 57) or that he did not believe in our form of government or our Constitution (R. 58) and that he was an honest and sincere, good man (R. 57), he heard his name called out on that drill field and he was "taken to the company's office" and the acting commander asked him if he was German and if he could read and write German. Upon being told that he could (R. 47) he was told "They want you in the Intelligence Office for translating a letter into English" (R. 47). There he was taken in hand by Lieutenant Sidney De Love of the Intelligence Service of the army and gradually eased into making an affidavit dictated by De Love (Exhibit 1, R. 74), which was the basis for his court-martial (R. 74-75) and subsequently this denaturalization proceeding. This affidavit was improperly secured from Geisler and every repetition of it by the officers receiving it was improper.

Second: Geisler was confined at Fort Sheridan in pursuance of his conviction by a court-martial when the original complaint to denaturalize him was filed against

him. Apparently he was distressed about this for he discussed it with the army officers at Fort Sheridan, and they told him he would automatically be denaturalized; that a German at that time had no standing in courts and he had "no rights then enforceable or defendable in courts" (R. 10-11) and the representatives of the office of the United States District Attorney's, Chicago, Illinois also told him that.

It is contended by the government that Geisler made the affidavit in question of his own free will and accord. Geisler was not making any affidavits but was drilling on the drill field attending to his duties and would never have made the affidavit if he hadn't been taken in tow by Lieut. De Love. De Love initiated it and it stands to reason that any private in the army of his age would be embarrassingly flustered when confronted by a lieutenant firing questions at him as De Love did (R. 47-48). Geisler testified (R. 47) that De Love asked him whether he would shoot his father and mother if ordered to do so (R. 47). No sane man would make the affidavit voluntarily that put Geisler in the predicament now occupied by him. Geisler testified that De Love told him if he signed the affidavit he would be transferred to a noncombatant unit (A. 53-54) and that he was so nervous that he did not know what he was signing (R. 47).

To follow up their determination to exterminate Geisler the officers at Fort Sheridan brought him to Chicago to face denaturalization proceedings, with the "fatherly advice" that a German had no rights in our courts at that time and that he might as well admit everything, and that advice was confirmed to him by the representatives of the United States District Attorney's office in Chicago in 1942. Under these circumstances he was stripped of the most precious gift of citizenship, a deprivation exceeding punishments for serious criminal

offenses, and in a land where counsel is obliged to come to the defense of defendants less seriously situated. This was a serious denial of his constitutional guaranties.

It is argued that Geisler voluntarily waived the right of counsel and confessed the complaint. A man imprisoned, in the custody of army officers receiving their advice and the advice of the law enforcing officers of the United States is hardly in a position to exercise judgment that will protect him. Especially is this true when both sets of officers misrepresented his rights to him.

The affidavit was clearly a confession secured while petitioner was under the domination if not the custody of a military officer. This sort of a confession has been denounced by our courts in several cases and is excluded by court-martial rules.

United States Army Manual for Courts-Martial (1928 Ed.), on page 116 says:

> "The fact that the confession to a military superior or to the representative or agent of such superior will ordinarily be regarded as requiring further inquiry into the circumstances, particularly where the case is one of an enlisted man confessing to a military superior or to the representative or agent of the superior."

Further on the same page:

> "Evidence that the accused stated that he made the confession freely without hope of reward or fear of punishment, etc. or evidence that the accused was warned just before he made the confession that his confession might be used against him or that he need not answer any questions that might tend to incriminate him is evidence, but not conclusive evidence that the confession was voluntary."

The case of *United States* v. *Boyer,* 331 U.S. 532; 67 S. Ct. 1394 was somewhat similar to the case at bar. There, one Radovich, a member of our armed forces, was

on trial for accepting a bribe for securing the transfer of another member of the army. The Court says on page 539 (1397 of 67 S. Ct.):

"*Radovich's* case raised additional questions. The first concerns the receipt in evidence of his confession of March 15 and 17, 1945. In absence of the jury, the Court heard testimony before admitting it and thereafter most of it was repeated before the jury. The proof against Radovich largely rested on the confession.

After service of distinction in Burma, Radovich, then 24 years of age, was ordered to report to Mitchel Field. Upon arrival on August 9, 1944, he was placed under arrest and confined in the psychopathic ward in the station hospital. Here for sometime, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges for court-martial were not promptly served on him as said to be required by the 70th Article of War, 10 U.S.C.A. Section 1542, nor was he taken before a magistrate for arraignment on any charges preferred by civil authorities. Military charges were finally served on May 30, 1945. Meanwhile, under such restraint, he made a first confession on September 5 or 6, 1944. Without more, we will assume this confession to be inadmissible under the rule laid down in *McNabb* v. *United States,* 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819, and *Anderson* v. *United States,* 318 U. S. 350, 63 S. Ct. 599, 87 L. Ed. 829. But this confession was neither offered nor received in evidence.

A second confession was made to Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945, was received, however, and the Court of Appeals has held it to be 'patently the fruit of the earlier one' and equally inadmissible, citing *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319, 24 A.L.R. 1426; *Nardone* v. *United States,* 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307."

From these authorities we submit it was obligatory on the part of the court-martial to reject the affidavit and, consequently, it should have been rejected in this proceding. Without that affidavit or the repetition of its contents there would have been no evidence against the defendant.

II.

Geisler filed a petition for a rehearing which was considered by the court a motion (R. 21). The government filed a motion to dismiss that. That motion was denied. It was then incumbent on the government to file an answer to Geisler's petition in the absence of which his allegations were admitted and in the absence of an answer there was nothing further to litigate.

A similar situation presented itself in the case of *Klapprott* v. *United States,* 335 U. S. 601, 69 S. Ct. 384 where the court says:

> "The undenied allegations already set out show that a citizen was stripped of his citizenship by his government without evidence, a hearing, or the benefit of counsel, at a time when the government was holding the citizen in jail without a reasonable opportunity for him effectively to defend his right to citizenship."

The point is that the court in the *Klapprott* case calls petitioner's allegations where no answer is filed "undenied allegations". That is the situation here.

III.

The Court of Appeals refused to apply the ruling of the Supreme Court in the case of *Klapprott* v. *United States,* 335 U. S. 601, 69 S. Ct. 384, 93 L. Ed. 279, so far as it holds the petition for "rehearing" or motion, as it was called in that case and also in the case at

bar, should not have been considered as filed in time (R. 134). We submit Geisler's petition, unanswered, undenied and presumed to be true, stands in the same position as the petition in the *Klapprott* case and the Court of Appeals is in error. The District Court was right. Since the *Klapprott* case there seems no doubt that a petition or motion to vacate may be filed at any time for excusable neglect.

IV.

The Court of Appeals doubts the legality of a "motion" to vacate after six months for reasons given in Rule 60 of Federal Rules of Civil Procedure (R. 133-134). It would seem to us that it is now well settled that it can be done. We cite the following authorities:

Klapprott v. *United States*, 335 U. S. 601, 69 S. Ct. 384

Jones, et al. v. *Watts, et al.*, 142 Fed. (2) 575-576

United States v. *Olden*, 84 Fed. Supp., S. D. N. Y. 6-10-49

Wallace v. *United States*, 142 Fed. (2) 240

Prevenden v. *Hahn, et al.*, 36 F. Supp. 952-953

Fiske, et al. v. *Bruder, et al.*, 125 F. (2) 841

Vol. 3, Moore's Federal Practice (p. 3266) (1938 Edition) and page 3273

We have excerpts from these cases in the petition for rehearing (R. 144-145-146-147-148-149) to which we respectfully refer the Court.

V.

The Circuit Court of Appeals says that testimony was heard at the time of the entry of the denaturalization judgment (R. 134) on November 24, 1942. No evidence besides Geisler's own admissions appear to have been

received and the record in this case discloses none. The certificate to the record states it is the entire record so that the original judgment was entered solely on Geisler's admissions.

VI.

The order of the District Court entered Nov. 7, 1946, on plaintiff's motion to dismiss petitioner's petition reads as follows (R. 23):

> "It is Ordered that the Final Decree entered in this cause on the 24th day of November, A. D. 1942, vacating the Order of this Court entered on the 19th day of September, 1940, admitting Hans Geisler to citizenship be vacated, set aside and held for naught, and that the Certificate of Naturalization, No. 4948436, issued by the Clerk of this Court to the said Hans Geisler, be and hereby is reinstated in full force and effect."
>
> Holly,
> District Judge."
>
> Nov. 7, 1946.

If this order had terminated when it vacated the denaturalization judgment it probably would not be a final order, but it went farther and gave affirmative relief so that it is not simply an interlocutory order. It reinstated a canceled naturalization certificate and gave it "full force and effect" (R. 23). This makes it a final order and if the government was not satisfied with it, it should have been appealed. On the contrary, they did nothing and whatever occurred thereafter was done at the direction of the court.

The Circuit Court of Appeals cites the case of *Savell* v. *Southern Ry. Co.*, 93 F. (2d) 377, 379; *Mellon* v. *Mertz*, 30 F. (2d) 311, and *United States* v. *Kiriaze*, 172 F. (2d) 1000, 1001. These cases do not touch the point

that we raise. There the court simply sustained demurrers and nothing further. That of course leaves the original complaint stand undisposed of and does not present a final order. Here, in the case at bar, the court not only vacated the prior judgment but then went further and entered an affirmative order reinstating a naturalization certificate. That leaves nothing undisposed of. That became a final order and we submit that having taken no appeal therefrom the government is bound thereby.

VII.

Petitioner was brought into court by officers of the United States Army and was continuously in custody from the date of his conviction by court-martial in April 1942 until released by writ of *habeas corpus* on November 7, 1946 (R. 24).

He was brought in to answer the denaturalization complaint. He says therein "that he is presently confined in the Guard House at Fort Sheridan, Illinois" (R. 5). While in that position and under the domination of the officers of the army and brought into the court for open admissions in the presence of a representative of the U. S. District attorney who had advised him that he could not make a defense, was he in a position to protect himself from disastrous consequences that could not be rectified? We think it was the duty of the court to appoint an attorney for his protection. True, it was not a criminal proceeding but a proceeding where the punishment could be more disastrous—deportation for which he was held when the petition for a rehearing was filed.

VIII.

The evidence in this case is not of a clear and convincing character to warrant cancellation and revocation of a naturalization certificate. If the affidavit, together with its repetitions, is taken out there is nothing left but Geisler's own testimony given at the instance of the government, and we submit that that is not sufficient for any denaturalization order. If the affidavit with its repetitions remain it is not sufficient.

Geisler testified that his answers to the original petition admitting everything was made because of misrepresentations made to him by officers of the Army and the representative of the United States District Attorney's office at Chicago, officers who should have told him the truth that he did have a standing in court, and that whole situation confused him so that he did not know what he was doing. That is stated in his petition for a rehearing (R. 9) and that is not denied by the government.

The facts in this case conform almost exactly to the facts in the case of *United States* v. *Olden*, 84 F. Supp. There Olden was charged with becoming a member of the bund, with saying that he wanted to return to Germany and live there permanently; that his loyalty has always been with Germany; that he hoped Germany would win the war, and furthermore he registered with his local draft board as unwilling to enter the armed forces of the United States, and he said that he refused to fight for the United States against Germany. The Court there held that Olden did not know the meaning or significance of his statements, saying:

> "But a hearing on the motion established that defendant's consent, though given without duress or coercion, was not an intentional surrender of citizen-

> ship made by one possessed of understanding of the proceedings or awareness of his rights and of the consequences of his act."

There, Olden also went to the United States District Attorney's office and after conferring with an assistant consented to a denaturalization judgment. There, we do not know whether the United States District Attorney misrepresented to Olden, but in the case at bar we do know that he represented to Geisler that Geisler had no standing in court, and that it would be useless for him to make a defense. In the *Olden* case the court says, 84 F. Supp. 6-10-49, S. D. N. Y. (Judge Rifkind):

> "Defendant was born in Germany in 1902, entered the United States in 1927, married in 1932, and naturalized in 1933. He was an automobile mechanic. Defendant was questioned by an Assistant United States Attorney on June 18, 1942, and served with a summons and complaint on July 8, 1942.
>
> On September 8, 1942 he was called to the United States Attorney's office and after some conversation with the same Assistant he signed and acknowledged a consent to judgment of denaturalization. He had no attorney at any time. The government did not advise him of his right to retain counsel. Upon the trial he exhibited so limited command of English that I found it desirable to utilize the service of an interpreter. * * *
>
> Because of his mediocre linguistic and intellectual abilities and his Nazi associations and proclivities it is credible that he was unaware of his rights to retain and be represented by counsel. In any case I do not believe that the defendant understood the consent or realized when he signed it that he was giving up his citizenship, thereby becoming an enemy alien who might be (as in fact he was) incarcerated for the next six or seven years, and subject to removal.

> That defendant took no appeal is no bar to present relief. He was quite unaware of his rights and could hardly have been expected to appeal, from a consent judgment the nature of which he did not really comprehend. Furthermore, judgment was rendered the same day the consent was signed, and the defendant was immediately confined in a detention camp. He was not released until a few months ago. While confinement alone might not necessarily excuse failure to appeal, the absence of counsel at any stage of the proceedings and the defendant's failure to understand what it was all about, sufficiently distinguish this case from the Kunz case, and excuses failure to appeal."

In that case the judgment was vacated seven years after entry and this was done under Section 60 (b) Federal Rules of Civil Procedure. And it was also done on almost all of the grounds that are presented in the case at bar—representations by Federal officers and misunderstanding and confusion on the part of the defendant of the significance of his action. Under such circumstances the evidence here is certainly not clear and convincing.

1. They say here that Geisler refused to fight. He did say that in the affidavit but his petition for rehearing on the original complaint filed (R. 10) says in reference thereto:

> 'Said statements were completely involuntary and were made without the benefit of counsel."

This allegation is not answered by the Government and is therefore admitted.

Furthermore, Geisler testified that he never refused to fight (R. 48).

However, refusing to fight is no bar to naturalization, therefore it should be no cause for denaturalization.

In the case of *Girouard* v. *United States*, 328 U. S. 61; 66 S. Ct. 826-827, this court held that an applicant for naturalization was not required to agree to fight for the United States and that case has been construed in the case of *Pet. of Crescenzi*, 79 F. Supp. 461-462 to mean that refusing to fight against one's former native land was not ground for denying naturalization. Therefore, it ought not to be ground for denaturalization. The Court there says:

> "Since unwillingness to bear arms is in itself no bar to naturalization" etc.

And it there holds that naturalization should not be refused for that reason.

Our Supreme Court has definitely said that citizenship in the United States of America is most certainly a possession that should not be taken from a person without the production of evidence of a clear and convincing character to warrant its cancellation and revocation.

In *Schneiderman* v. *United States*, 370 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1525, Justice Murphy speaking for the court said at page 1800 of 87 L. Ed.:

> "• • • in an action instituted under paragraph 15 for the purpose of depriving one of the precious rights of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen. Especially is this so when the attack is made long after the time when the certificate of citizenship was granted and the citizen has meanwhile met his obligations and has committed no act of lawlessness. It is not denied that the burden of proof is on the Government in this case. For reasons presently to be stated this burden must be met with evidence of a clear and convincing character that when citizenship was conferred upon petitioner in 1927 it was not done in accordance with strict legal requirements."

In *Baumgartner* v. *United States*, 322 U. S. 665, 64 S. W. 1240, 88 L. Ed. 1525, Mr. Justice Frankfurter speaking for the Court said at page 1531 of 88 L. Ed.:

> "• • • New relations and new interest flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. • • • That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion. • • •"

CONCLUSION.

This entire proceeding from the beginning of the interview between Geisler and Lieut. De Love on January 24, 1942, which produced the affidavit,—the basis of the denaturalization proceeding—to the closing of the hearing on November 7, 1946, discloses that petitioner was either a prisoner of the government or was in the technical, or actual custody of U. S. officers, and, therefore, restrained from exercising complete freedom of actions. He was a prisoner on Ellis Island in New York when his petition for rehearing was prepared and was not released until the order of November 7, A. D. 1946. By that time, all the damage had been done. The affidavit was secured and the answer was extracted from him and whatever occurred thereafter was simply a rehashing of what had already taken place. He was imposed upon and his constitutional guaranties were abridged. His technical defense on the law he presents as a last refuge against

illegal onslaughts. His petition for a rehearing produc
a final order that should be regarded as such and sho
now be in force. But, aside from all of that, the comp
tent evidence in this case does not justify denaturali
tion.

On the basis of the foregoing, therefore, we urge, an
it is respectfully submitted, that the writ of certiora
should issue.

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